RECORD AND BRIEFS

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In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

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[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra*. Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

Markle Interests, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C., Plaintiffs–Appellants

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq.* As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

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[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20.*

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity of Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id.*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur.*"[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species.*"[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* (emphasis added).

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

* * *

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

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[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

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merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

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must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*,—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan*, 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez*, which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF*, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales*, 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF*, 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), *cert. denied*, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II*, 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1436–39 (10th

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
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Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

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Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

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The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat, Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall,* in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

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For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion.*

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared. "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g., Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non-Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

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16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.